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Federal Communications Commission

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 91-58
Table of Allotments,) RM-7419
FM Broadcast Stations.) RM-7797
(Caldwell, College Station) RM-7798
and Gause, Texas))

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 10, 2000

Released: February 15, 2000

By the Commission:

1. The Commission has before it the Order in Henderson v. FCC, D.C. Cir. 98-1372 (March 8, 1999) in which the U.S. Court of Appeals, in response to a Commission request, remanded this proceeding to the Commission and the comments responding to our subsequent Request for Supplemental Comments in Response to Court Remand ("Request for Supplemental Comments"). 14 FCC Rcd 6258 (1999). The purpose of the remand is to afford us the opportunity to evaluate a Second Supplement to Application for Review filed by Roy E. Henderson ("Henderson") which was inadvertently not considered in our earlier decision in this proceeding. 13 FCC Rcd 13772 (1998). The Request for Supplemental Comments was adopted in order that our final decision have the benefit of comment by the parties in this proceedings. In response to the Request for Supplemental Comments, both Henderson and Bryan Broadcasting License Subsidiary, Inc. ("Bryan Broadcasting") filed Supplemental Comments and Reply Comments, and KRTS, Inc. filed Comments.¹ Henderson also filed Reply Comments in Response to Comments of Bryan Broadcasting License Subsidiary, Inc. We affirm our earlier action.

Background

2. In the Report and Order in this proceeding, the staff granted a proposal filed by Bryan Broadcasting License Subsidiary, Inc. ("Bryan Broadcasting"), licensee of Station KTSR, Channel 297C3, College Station, Texas, for a modification of its license to specify operation on Channel 236C2. 10 FCC Rcd 7285 (1995). In doing so, the staff denied a conflicting proposal filed by Henderson, permittee of Station KHEN, Channel 236A, Caldwell, Texas, proposing a modification

¹In its Comments, KRTS, Inc., licensee of Station KRTS, Seabrook, Texas, urges that we resolve this proceeding as expeditiously as possible in order that it may upgrade Station KRTS to full Class C1 facilities.

Henderson, permittee of Station KHEN, Channel 236A, Caldwell, Texas, proposing a modification of his construction permit to specify operation on Channel 236C2. That decision was based on two grounds. First, the Henderson upgrade would not provide the requisite 70 dBu signal to any of Caldwell in contravention of Section 73.315(a) of the Commission's Rules. The subsequent engineering submissions by Henderson purporting to demonstrate that his upgrade proposal would cover 96% of Caldwell were untimely and in any event did not demonstrate that his upgrade proposal would cover 96% of Caldwell. Second, the Bryan Broadcasting proposal would comply with Section 73.315(a) of the Rules and we determined that the proposal complying with all Commission technical requirements should be preferred over the competing proposal that did not comply with Section 73.315(a) of the Rules. Thereafter, the staff denied a Petition for Reconsideration filed by Henderson, 11 FCC Rcd 5326 (1996), and we denied an Application for Review.

3. On January 24, 1997, Bryan Broadcasting filed an application to implement its Channel 236C2 upgrade (File No. BPH-9701241A). That application was granted on March 20, 1998. In his Second Supplement to Application for Review filed earlier on September 9, 1997, Henderson noted that the Bryan Broadcasting application proposed a transmitter site that would enable Station KTSR to cover only 91% of College Station with the 70 dBu signal required by Section 73.315(a). Therefore, Henderson contends that a basis for the decision in favor of the Bryan Broadcasting upgrade no longer exists and that the decision should be revisited. In this connection, Henderson also argues that Bryan Broadcasting should not be permitted to file another application to propose a site that would enable Station to fully comply with Section 73.315(a) and thereby regain an unwarranted comparative advantage in this proceeding.

4. In his Supplemental Comments pertaining to the judicial remand, Henderson reiterates his contention that his proposed upgrade would encompass 96% of Caldwell, and, as the "vastly superior" proposal, should have prevailed over the competing Station KTSR upgrade proposal. With respect to his deficiency, Henderson notes that in the processing of construction permit applications, 80% coverage of a community of license has been determined to be "substantial compliance" with Section 73.315(a) of the Rules and not an impediment to grant of the application.

5. In his Supplemental Comments and Reply Comments, Henderson also addresses his Second Supplement to Application for Review. Specifically, Henderson reiterates the background and his allegations surrounding the filing of the Bryan Broadcasting application to implement its Channel 236C2 upgrade. In that application, filed January 24, 1997, Henderson notes that Bryan Broadcasting set forth specific coordinates at which it would construct a new tower that would enable Station KTSR to provide principal city coverage to all of College Station. In addition, Bryan Broadcasting stated that it had notified the FAA of the proposed construction on October 6, 1996. In the processing of that application, the staff notified Bryan Broadcasting on May 29, 1997, that it could find no record in its files or the FAA records of the proposed tower described in the application. In response to that staff letter, Bryan Broadcasting's counsel submitted a letter on June 30, 1997, indicating that there had been "some confusion" as to the actual transmitter site. Instead of

constructing a tower at its proposed site, Bryan Broadcasting stated that it now intended to lease space on an existing tower. On July 15, 1997, Bryan Broadcasting amended its application to specify the new transmitter site on an existing tower. As noted by Henderson, operation at this site will result in 8.4% of College Station not receiving the requisite 70 dBu signal as required by Section 73.315(a) of the Rules. On March 20, 1998, the staff granted this application. In doing so, the staff denied an Informal Objection filed by Henderson contending that it would not be in the public interest to go forward with construction of the facilities while the Channel 236C2 upgrade is subject to appeal. The grant of that application is now final.

6. In its Supplemental Comments and Reply Comments, Bryan Broadcasting notes that on April 19, 1999, it filed an application for modification of its construction permit for Channel 236C2 facilities to specify a new transmitter (File No. BMPH-990419IB). From this site, Station KTSR will provide a 70 dBu signal to all of College Station. As such, Bryan Broadcasting contends that the issues raised by Henderson in his Second Supplement to Application for Review are now moot. In addition, Bryan Broadcasting states that the engineering submissions by Henderson alleging enhanced coverage of Caldwell were both untimely and flawed. Finally, Bryan Broadcasting defends the Commission policy of requiring 100% compliance with Section 73.315(a) of the Rules at the allotment stage while 80% coverage of a community of license at the application stage has been determined to be "substantial compliance."

Discussion

Principal City Coverage of Caldwell

7. In addressing the Supplemental Comments in this proceeding, it is first necessary to restate our position that the Henderson proposal does not provide a 70 dBu signal to any portion of Caldwell. Throughout his Supplemental Comments and Reply Comments, Henderson repeatedly states that his proposal will encompass 96% of Caldwell. This contention has been rejected and we do so again here. As stated earlier, we make our determination as to whether the entire community receives a signal strength of 70 dBu or greater on the basis of standard propagation signal methodology, the F(50,50) curves, which predicts the distance from the transmitting antenna site proposed in a rulemaking proceeding to a specific signal strength, such as 70 dBu, given the specified radiated power and the height of the antenna above average terrain. These curves are based on the propagation characteristics of radio signals transmitted in the FM band and assume "uniform terrain." Uniform terrain is the average terrain found in all areas of the United States, excluding sharp variations such as ridges and valleys. Based upon our presumption of uniform terrain and maximum permissible facilities (50 kilowatts at 150 meters above average terrain), the 70 dBu signal of a Class C2 facility extends 32.6 kilometers from the proposed reference site and, in this instance, would not cover any portion of Caldwell. Henderson contends that on the basis of actual terrain, the 70 dBu would extend 34.9 kilometers and encompass 96% of Caldwell.

8. Henderson did not comply with our established requirements which permit an exception to the presumption of uniform terrain. Woodstock and Broadway, Virginia, 3 FCC Rcd 6398 (1988). Under the Woodstock exception, a rulemaking proponent must, in addition to depicting the actual terrain, demonstrate a reasonable assurance of the availability of the proposed transmitter site and that FAA approval of the proposed antenna structure has been obtained. In this regard, Henderson submitted an affidavit from the landowner affirming the availability of the property for locating the antenna structure. This affidavit does not by itself meet the Woodstock requirement for the exception to the presumption of uniform terrain because there is no indication that a tower 150 meters above average terrain could be erected with FAA approval and, if so, at what location on the property. The reason for these requirements is that under the presumption of uniform terrain, the proposal will not comply with our technical requirements. As such, it is imperative for a rulemaking proponent to set forth actual facilities that could be constructed which would enable its proposal to comply with our technical requirements. To this end, the Woodstock requirements are a means of assuring that the facilities can be constructed.

9. Furthermore, we note that in his brief, Henderson referred to the existence of a 152-meter tower in the Commission tower registration data base (ID Tower 9320) located 1.2 miles from his proposed site. Henderson appears to suggest that the FAA would also approve a 150-meter tower at his proposed site and that the Commission was unwarranted in any requirement that Henderson demonstrate that FAA approval could be obtained for the tower at his proposed site. This argument fails. It is not incumbent upon the Commission to undertake an FAA study on behalf of every applicant or petitioner wishing an exception to the presumption of uniform terrain under Woodstock. Indeed, the Commission does not have the resources to undertake these studies given that there are approximately 60,700 towers requiring FAA notification in the Commission tower registration data base. Moreover, the tower referred to by Henderson was registered in April of 1998 (Registration No. 1044896), after the staff decision denying the Henderson Petition for Reconsideration on April 26, 1996. In this regard, the exact location of the proposed tower is crucial because of the need to know the actual distance from the tower to Caldwell and the radial of the signal propagation. Once the rulemaking proponent has ascertained this radial, it would then be able to depict the actual terrain on that radial. It is also critical that the tower be at least 150 meters in height above average terrain in order that the 70 dBu signal extend its maximum distance toward Caldwell. Henderson has submitted no aeronautical study or other information indicating that the FAA would approve such a tower 1.2 miles from an existing tower. At this juncture, we continue to believe that there is no basis under Woodstock to support a conclusion that the 70 dBu signal will, in this instance, extend more than the 32.6 kilometers normally presumed for a Class C2 facility.

10. In his Petition for Reconsideration and Application for Review, Henderson referred to a "further analysis using the more accurate determinations of a procedure developed by the National Bureau of Standards (commonly referred to as Tech Note 101)." According to Henderson, this submission verified "complete compliance" of his proposal with Section 73.315(a) of the Rules. In our earlier action, we first noted that Henderson made no attempt to explain why this engineering submission could not have been provided earlier in the proceeding and that Sections 1.106(c) and

1.115(c) of the Rules preclude favorable action on these pleadings premised on matters which through the exercise of ordinary diligence could have been submitted earlier in this proceeding. Nevertheless, we evaluated the Tech Note 101 submission and determined that would not have been acceptable in this proceeding. Specifically, in order to use an alternate propagation methodology, such as Tech Note 101, Section 73.313(e) of the Rules requires that the terrain area vary widely from the terrain around the proposed site. Otherwise, the standard propagation signal methodology using the F(50,50) curves discussed earlier will accurately predict the extent of the 70 dBu signal contour. In this instance, the radial between the proposed transmitter site and Caldwell is 174 meters above average terrain while the average terrain in the area is 150 meters above average terrain. The variance of 24 meters is not a wide departure from average terrain and does not justify a conclusion that the terrain is so unusual that a methodology such as Tech Note 101 is appropriate. This is because our F(50,50) curves assume a terrain variance of 50 meters. Cf. Elkins, West Virginia, Mountain Lake Park and Westernport, Maryland, 7 FCC Rcd 5527 (1992); see also Saltville, Virginia and Jefferson, North Carolina, 11 FCC Rcd 5234 (1996); Harrisburg and Albemarle, North Carolina, 11 FCC Rcd 2511 (1996).

11. In a separate context from Tech Note 101, Henderson also contended that the use of the terrain roughness correction formula set forth in Section 73.313(f) of the Rules demonstrates that his proposal will provide a 70 dBu signal to all of Caldwell. Again, we reviewed this separate argument advanced by Henderson and rejected its conclusion. In accordance with Section 73.313(f), we used the terrain profile segment 10 to 32 kilometers from the proposed transmitter site to determine the terrain roughness factor, referred to as "delta-h." As discussed in our decision, we calculated the delta-h to be 48 meters. The delta-h was then used in the formula for terrain roughness correction to determine how far the 70 dBu signal would extend beyond the distance predicted by the F(50,50) curves. Using the delta-h value of 48 meters, the terrain roughness correction is 0.004 dBu, which represents the amount by which the signal would be enhanced. This would extend the predicted 70 dBu signal less than one tenth of a kilometer and still would not reach Caldwell. This negligible distance is attributable to the fact that the delta-h of 48 meters is not significantly different from 50 meters which is the delta-h terrain correctness factor assumed in our F(50,50) field strength chart used in determining FM coverage.

Bryan Broadcasting Implementation of Upgrade

12. As correctly noted by Henderson, the outstanding Station KTSR construction permit to implement that upgrade covers only 91% of College Station with the requisite 70 dBu signal. Subsequently, on April 19, 1999, Bryan Broadcasting filed a second application (File No. BMPH-990419IB) which proposed a site and facilities that would enable Station KTSR to provide the requisite signal to all of College Station. We recognize that this application was not filed until after Henderson had brought this matter to our attention. Henderson has filed an Informal Objection directed to that application. In that Informal Objection and Reply Comments in this proceeding, Henderson argues that this application is part of a pattern of a "lack of candor" and "abuse of process" by Bryan Broadcasting in order to gain an unwarranted advantage in a rulemaking

proceeding. These allegations will be considered in the context of that application proceeding. With respect to the Henderson allotment proposal, we emphasize that we would not have favorably entertained this proposal even if there were no competing allotment proposal. In regard to this allotment proceeding, our determination was premised on the fact that the Henderson would not provide any portion of Caldwell with the requisite 70 dBu signal, while, based on the technical record in this proceeding, the Bryan Broadcasting proposal can be implemented in compliance with Section 73.315(a) of the Rules.

13. While not addressing the substance of the Informal Objection, we do make some observations on the policy referred to by Henderson in other pleadings relating to our consideration of the competing allotments in this proceeding. This policy concerns the fact that while we have required strict compliance with Section 73.315(a) at the allotment stage, 80% coverage of a community of license has been determined to be substantial compliance and Section 73.315(a) can be waived to that extent at the application stage. See Amendments of Part 73 and 74 of the Commission's Rules to Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit, 12 FCC Rcd 12371 (1997); Amendment of the Commission's Rules to Permit FM Channel and Class Modification by Application, 8 FCC Rcd 4735 (1993). At the outset, as detailed in paragraphs 7 through 11, *supra*, we note that the Henderson proposal does not cover any portion of Caldwell and would not meet either an 80% or 100% coverage requirement. Thus, Henderson's invocation of the 80% "substantial compliance" test does not help his case.

14. In any event, we believe that there are valid reasons for considering Section 73.315(a) differently at the allotment stage as opposed to the processing of an application. First of all, we generally cannot, in the course of a rulemaking proceeding, evaluate the actual transmitter site that will be specified in applications not yet filed. There is no requirement, or even assurance, that a successful rulemaking proponent will specify in a subsequent application the reference coordinates for a transmitter site proposed in the rulemaking proceeding. As such, consideration of a waiver request at the allotment stage would be premature. Second, it continues to be our view that in order to maintain the technical integrity of the FM broadcast service, we should strictly adhere to our technical requirements at the allotment stage in order to increase the likelihood that the eventual authorization will comply with our technical requirements. See Terrell and Daingerfield, Texas, 5 FCC Rcd 556 (1990); Greenwood, Seneca, Aiken and Clemson, South Carolina, and Biltmore Forest, North Carolina, 3 FCC Rcd 4108 (1988). In this vein, if we did not require strict compliance with our technical requirements at the allotment stage, the likelihood of the subsequent application not complying with these requirements would be far greater. Therefore, at the allotment stage, we consider and require a theoretical reference site at which we may determine that a transmitter could be located in compliance with all Commission technical requirements. This enables us to make a threshold determination that a proposal is capable of being implemented in accordance with all technical requirements. Subsequently, at the application stage, we can evaluate the application proposing the actual facilities at a specific site to determine if any waiver is warranted and whether the grant of the application would be in the public interest.

15. In regard to its pending application, Bryan Broadcasting filed a Supplement to Remand Filing on August 17, 1999, in which Bryan Broadcasting informed the Commission that the FAA has determined that the proposed tower set forth in the application is a presumed hazard to air navigation. Thereafter, on September 1, 1999, Bryan Broadcasting amended this application to propose a new site which would obviate potential interference to a GPS based instrument approach procedure which resulted in the earlier presumed hazard to air navigation determination. In regard to these submissions, Henderson filed Comments on Bryan Supplement. In his Comments, Henderson continues to oppose any application by Bryan Broadcasting to provide 70 dBu to 100% of College Station as well as any amendment to such an application. Henderson characterizes the Bryan Broadcasting application as "an 11th hour attempt to change the facts of this case, to propose a new fully compliant site for the purposes of the Commission decision on remand." As such, Henderson contends that it would be "grossly unfair and inequitable, and a violation of Henderson's rights of administrative due process, as well as the remand of the Court" to now consider the Bryan Broadcasting application in the context of this proceeding. For this reason, Henderson argues that for the "purposes of this case before the Commission, the facts are, and should be in any case, as they were at the time of the last consideration and Decision by the Commission as issued July 22, 1998, and as they existed at the time of the Court's remand."

16. We will continue to process the pending Bryan Broadcasting application looking toward providing the entire community of College Station with 70 dBu coverage as well as the Henderson Informal Objection directed against that application. There is nothing in the Court remand or the Commission's Rules which would preclude Bryan Broadcasting from filing this application. As stated earlier, our decision in this comparative allotment proceeding was predicated on a Bryan Broadcasting proposal being able to provide the requisite 70 dBu signal to all of College Station as required by Section 73.315(a) of the Rules while the Henderson proposal will not provide a 70 dBu signal to any of Caldwell. Any favorable finding on the technical aspect of the Bryan Broadcasting application merely confirms an already stated basis for our earlier decision.

17. We also note that the existing Bryan Broadcasting construction permit implementing its upgrade does not warrant reversing our determination in the rulemaking proceeding even though it covers only 91% of College Station. The dichotomy of considering Section 73.315(a) differently at the allotment and application stages would have no impact on the resolution of the allotment proceeding. In this proceeding, we compared competing allotment proposals. Using our existing standard propagation methodology, it was theoretically possible to implement the Bryan Broadcasting allotment proposal in compliance with Section 73.315(a) of the Rules while it was not possible to implement the Henderson proposal in compliance with Section 73.315(a). The Station KTSR Channel 236C2 upgrade at College Station continues to be preferable to the competing proposal for a Channel 236C2 upgrade for Station KHEN at Caldwell. As discussed above, Henderson's proposed Channel 236C2 upgrade does not and will not provide any portion of Caldwell with the requisite 70 dBu signal required by Section 73.315(a) of the Rules. Such a proposal would not be favorably entertained either at the allotment stage or under the waiver criteria at the application stage. On the other hand, the Bryan Broadcasting proposal now provides 91% of

College Station with a 70 dBu signal and, on the basis of an engineering exhibit in its pending application, can be technically implemented at 100% coverage of College Station.

18. As discussed above, we have reviewed the entire record in this proceeding including the Second Supplement to Application for Review along with the Supplemental Comments and Reply Comments filed by Bryan Broadcasting and Henderson. We continue to believe that the proposed Bryan Broadcasting upgrade at College Station is preferable to Henderson's conflicting proposed upgrade at Caldwell. For this reason, we affirm our earlier decision in this proceeding.

19. Accordingly, IT IS ORDERED, That the aforementioned Memorandum Opinion and Order in this proceeding released July 22, 1998, denying an Application for Review filed by Roy E. Henderson IS HEREBY AFFIRMED.

20. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

21. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary